

MONTANA LEGISLATIVE HISTORY

Chapter 493 ~~19~~ 2001

Bill H 151 S _____ Original bill & history ☒ c

H. Committee on Judiciary

Hearing Date(s) 1/10 _____ c

1/31 _____ c

2/14 _____ c

_____ c

Date Out _____ c

S. Committee on Judiciary

Hearing Date(s) 3/14 _____ c

3/26 _____ c

_____ c

_____ c

Did this bill originate in an interim committee? _____ Yes _____ No

Committee _____

Report _____

LEGISLATIVE HISTORIES SINCE 1997

The scope and depth of legislative committee minutes varies by year and by committee. If you would like additional information about a hearing, you may want to determine whether the hearing was recorded. In addition, some recent floor debates were also recorded. For information on accessing or purchasing these recordings, contact the Historical Society Archives at 406-444-4774.

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HOUSE BILLS AND RESOLUTIONS

361

10/16	Fiscal Note Needed		
12/22	Introduced		
12/26	Fiscal Note Requested		
12/28	Referred to Business and Labor		
1/08	Fiscal Note Received		
1/10	Fiscal Note Printed		
1/11	Hearing		
1/12	Committee Executive Action--Bill Passed	11	8
1/12	Committee Report--Bill Passed		
1/16	2nd Reading Passed	53	46
1/17	3rd Reading Passed	52	48
	Transmitted to Senate		
1/18	Referred to Business and Labor		
2/05	Hearing		
3/06	Tabled in Committee		
	Died in Standing Committee		

HB 151 Introduced by Newman

LC0342 Drafter: MacMaster

Clarify Probation Laws

By Request of Department of Corrections

12/22	Introduced		
12/28	Referred to Judiciary		
1/10	Hearing		
1/31	Tabled in Committee		
2/16	Taken from Table in Committee		
2/16	Committee Executive Action--Bill Passed as Amended	15	5
2/16	Committee Report--Bill Passed as Amended		
2/22	2nd Reading Passed	79	21
2/23	3rd Reading Passed	80	20
	Transmitted to Senate		
3/01	Referred to Judiciary		
3/14	Hearing		
3/26	Committee Executive Action--Bill Concurred	7	0
3/26	Committee Report--Bill Concurred		
3/27	2nd Reading Concurred as Amended on Voice Vote	46	0
3/28	3rd Reading Concurred	47	0
	Returned to House with Amendments		
4/12	2nd Reading Senate Amendments Concurred	96	3
4/13	3rd Reading Passed as Amended by Senate	92	8
4/13	Sent to Enrolling		
4/16	Returned from Enrolling		
4/19	Signed by Speaker		
4/21	Signed by President		
4/23	Transmitted to Governor		
5/01	Signed by Governor		
5/01	Chapter Number Assigned		
	Chapter Number 493		
	Effective Date: 5/01/2001 - All Sections		

HB 152 Introduced by Gallik

LC0335 Drafter: Heffelfinger

Revise Public Retirement Laws

By Request of Public Employees' Retirement Board

12/22 Introduced

HOUSE BILL NO. 151

INTRODUCED BY B. NEWMAN

BY REQUEST OF THE DEPARTMENT OF CORRECTIONS

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THAT THE DEPARTMENT OF CORRECTIONS ONLY SUPERVISES PROBATIONERS WHO ARE FELONY OFFENDERS; CLARIFYING THAT THE DISTRICT COURT MAY ADD CONDITIONS TO OR MODIFY CONDITIONS OF PROBATION; PROVIDING A PROCEDURE FOR ADDING OR MODIFYING CONDITIONS OF PROBATION; CLARIFYING PROVISIONS RELATING TO PROBATION REVOCATION HEARINGS; PROVIDING FOR AN INFORMAL PROBATION VIOLATION INTERVENTION HEARING; AMENDING SECTIONS 46-18-111, 46-18-203, 46-23-1004, 46-23-1011, AND 46-23-1012, MCA; REPEALING SECTION 46-23-1013, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 46-18-111, MCA, is amended to read:

"46-18-111. Presentence investigation -- when required. (1) Upon the acceptance of a plea or upon a verdict or finding of guilty to one or more felony offenses, the district court shall direct the probation officer to make a presentence investigation and report. The district court shall consider the presentence investigation report prior to sentencing. If the defendant was convicted of an offense under 45-5-502, 45-5-503, 45-5-504, 45-5-505, 45-5-507, 45-5-625, or 45-5-627, the investigation must include a psychosexual evaluation of the defendant and a recommendation as to treatment of the ~~offender~~ defendant in the least restrictive environment, considering the risk the ~~offender~~ defendant presents to the community and ~~offender~~ the defendant's needs, unless the defendant was sentenced under 46-18-219. The evaluation must be completed by a sex offender therapist who is a member of the Montana sex offender treatment association or has comparable credentials acceptable to the professional and occupational licensing bureau of the department of commerce. The psychosexual evaluation must be made available to the county attorney's office, the defense attorney, the probation and parole officer, and the sentencing judge. All costs related to the evaluation must be paid by the defendant. If the defendant is determined by the district court to be indigent, all costs related to the evaluation are the responsibility of

a district court and must be paid by the county or the state, or both, under Title 3, chapter 5, part 9.

(2) The court shall order a presentence report unless the court makes a finding that a report is necessary. Unless the court makes ~~such a~~ that finding, a defendant convicted of any offense not enumerated in subsection (1) that may result in incarceration for 1 year or more may not be sentenced before a written presentence investigation report by a probation and parole officer is presented to and considered by the district court. ~~The district court may, in its discretion, order a presentence investigation for a defendant convicted of a misdemeanor."~~

Section 2. Section 46-18-203, MCA, is amended to read:

"46-18-203. Revocation of suspended or deferred sentence. (1) Upon the filing of a petition for revocation showing probable cause that the offender has violated any condition of a sentence or any condition of a deferred imposition of sentence, the judge may issue an order for a hearing on revocation. The order must require the offender to appear at a specified time and place for the hearing and be served by delivering a copy of the petition and order to the offender personally. The judge may also issue an arrest warrant directing any peace officer or a probation and parole officer to arrest the offender and bring the offender before the court.

(2) The petition for a revocation must be filed with the sentencing court during the period of suspension or deferral. Expiration of the period of suspension or deferral after the petition is filed does not deprive the court of its jurisdiction to rule on the petition.

(3) The provisions pertaining to bail, as set forth in Title 46, chapter 9, are applicable to persons arrested pursuant to this section.

(4) Without unnecessary delay, the offender must be brought before the judge, and the offender must be advised of:

- (a) the allegations of the petition;
- (b) the opportunity to appear and to present evidence in the offender's own behalf;
- (c) the opportunity to question adverse witnesses; and
- (d) the right to be represented by counsel at the revocation hearing pursuant to Title 46, chapter 1, part 1.

(5) A hearing is required before a suspended or deferred sentence can be revoked or the terms or conditions of the sentence can be modified, unless:

(a) the offender admits the allegations and waives the right to a hearing; or

(b) the relief to be granted is favorable to the offender and the prosecutor, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation is not favorable to the offender for the purposes of this subsection (5)(b).

(6) At the hearing, the prosecution shall prove, by a preponderance of the evidence, that there has been a violation of the terms and conditions of the suspended or deferred sentence. However, when a failure to pay restitution is the basis for the petition, the offender may excuse the violation by showing sufficient evidence that the failure to pay restitution was not attributable to a failure on the offender's part to make a good faith effort to obtain sufficient means to make the restitution payments as ordered.

(7) (a) If the judge finds that the offender has violated the terms and conditions of the suspended or deferred sentence, the judge may:

(i) continue the suspended or deferred sentence without a change in conditions;

(ii) continue the suspended sentence with modified or additional terms and conditions;

(iii) revoke the suspension of sentence and require the offender to serve either the sentence imposed or any lesser sentence; or

(iv) if the sentence was deferred, impose any sentence that might have been originally imposed.

(b) If a suspended or deferred sentence is revoked, the judge shall consider any elapsed time and either expressly allow all or part of the time as a credit against the sentence or reject all or part of the time as a credit. The judge shall state the reasons for the judge's determination in the order. Credit, however, must be allowed for time served in a detention center or home arrest time already served.

(c) If a judge finds that an offender has not violated a term or condition of a suspended or deferred sentence, that judge is not prevented from setting, modifying, or adding conditions of probation as provided in 46-23-1011.

(8) If the judge finds that the prosecution has not proved, by a preponderance of the evidence, that there has been a violation of the terms and conditions of the suspended or deferred sentence, the petition must be dismissed and the offender, if in custody, must be immediately released."

Section 3. Section 46-23-1004, MCA, is amended to read:

"46-23-1004. Duties of department. The department is responsible for any investigation and supervision requested by the board or the courts for felony offenders. The department shall:

- (1) divide the state into districts and assign probation and parole officers to serve in these districts courts;
- (2) obtain any necessary office quarters for the staff in each district;
- (3) assign the secretarial, bookkeeping, and accounting work to the clerical employees, including receipt and disbursement of money;
- (4) direct the work of the probation and parole officers and other employees;
- (5) formulate methods of investigation, supervision, recordkeeping, and reports;
- (6) conduct training courses for the staff;
- (7) cooperate with all agencies, public and private, that are concerned with the treatment or care of persons on probation or parole;
- (8) administer the interstate compact for the supervision of parolees and probationers; and
- (9) notify the employer of a probationer or parolee if the probationer or parolee has been convicted of an offense involving theft from an employer."

Section 4. Section 46-23-1011, MCA, is amended to read:

"46-23-1011. Supervision on probation. (1) The department shall supervise ~~offenders~~ probationers during their probation period in accord with the conditions set by a sentencing judge. If the sentencing judge did not set conditions of probation at the time of sentencing, the court shall, at the request of the department, hold a hearing and set conditions of probation. The probationer must be present at the hearing. The probationer has the right to counsel as provided in chapter 8 of this title.

(2) A copy of the conditions of probation must be signed by the probationer ~~and given to the probationer and the probationer's probation and parole officer, who shall report on the probationer's progress under rules of the sentencing judge. Any probation agreement signed by the probationer may contain a clause waiving extradition. The department may require a probationer to waive extradition for the probationer's return to Montana.~~

(3) The probation and parole officer shall regularly advise and consult with the probationer to encourage the probationer to improve the probationer's condition and conduct and shall inform the probationer of the restoration of rights on successful completion of the sentence.

(4) (a) The probation and parole officer may recommend and a judge may modify or add any condition of probation or suspension of sentence at any time. ~~Notice must be given to the probation and~~

1 ~~parole officer before any condition is modified, and the officer must be given an opportunity to present the~~
2 ~~officer's ideas or recommendations on any modification.~~

3 (b) The probation and parole officer shall provide the county attorney in the sentencing jurisdiction
4 with a report that identifies the conditions of probation and the reason why the officer believes that the
5 judge should modify or add the conditions.

6 (c) The county attorney may file a petition requesting that the court modify or add conditions as
7 requested by the probation and parole officer.

8 (d) The court may grant the petition if the probationer does not object. If the probationer objects
9 to the petition, the court must hold a hearing pursuant to the provisions of 46-18-203.

10 (e) The provisions of 46-18-203(7)(a)(ii) do not apply to this section.

11 (f) A The probationer shall sign a copy of a modification of new or modified conditions must be
12 delivered to the probation and parole officer and the probationer. Waiver or modification of probation. The
13 court may waive or modify a condition of restitution may be ordered only as provided under the provisions
14 of in 46-18-246.

15 ~~(5) The probation and parole officer shall keep records as the department or the sentencing judge~~
16 ~~may require.~~

17 ~~(6)(5)~~ (a) Upon recommendation of the probation and parole officer, a judge may conditionally
18 discharge a probationer from supervision before expiration of the probationer's sentence if:

19 (i) the judge determines that a conditional discharge from supervision:

20 (A) is in the best interests of the probationer and society; and

21 (B) will not present unreasonable risk of danger to the victim of the offense; and

22 (ii) the offender has paid all restitution and court-ordered financial obligations in full.

23 (b) Subsection ~~(6)(a)~~ (5)(a) does not prohibit a judge from revoking the order suspending execution
24 or deferring imposition of sentence, as provided in 46-18-203, for a probationer who has been
25 conditionally discharged from supervision.

26 (c) If the department certifies to the sentencing judge that the workload of a district probation and
27 parole office has exceeded the optimum workload for the district over the preceding 60 days, the judge
28 may not place an offender on probation under supervision by that district office unless the judge grants
29 a conditional discharge to a probationer being supervised by that district office. The department may
30 recommend probationers to the judge for conditional discharge. The judge may accept or reject the

1 recommendations of the department. The department shall determine the optimum workload for each
2 district probation and parole office."

3

4 **Section 5.** Section 46-23-1012, MCA, is amended to read:

5 **"46-23-1012. Arrest when violations of probation alleged -- probation compliance plan -- probation**
6 **violation ~~prison diversion program intervention~~.** (1) At any time during probation ~~or suspension of sentence,~~
7 ~~if a probation and parole officer reasonably believes that the probationer has violated a condition of~~
8 ~~probation,~~ a court ~~or the probation and parole officer~~ may issue a warrant for the arrest of the ~~defendant~~
9 ~~for violation of any of the conditions of release~~ probationer or a county attorney may issue a notice to
10 appear to answer to a charge of probation violation. The notice must be personally served upon the
11 ~~defendant~~ probationer. The warrant must authorize ~~all~~ law enforcement officers ~~named in the warrant to~~
12 ~~return the defendant probationer to the custody of the court or to any suitable detention facility designated~~
13 ~~by the court center.~~

14 (2) Any probation and parole officer may arrest the ~~defendant~~ probationer without a warrant or
15 may orally deputize any other officer with power of arrest to do so by giving the officer oral authorization
16 and within 12 hours delivering to the ~~place of detention~~ center a written statement setting forth that the
17 ~~defendant~~ probationer has, in the judgment of the probation and parole officer, violated the conditions of
18 ~~the defendant's release~~ probation. A written statement or oral authorization delivered with the ~~defendant~~
19 probationer by the arresting officer to the official in charge of a ~~county~~ detention center ~~or other place of~~
20 ~~detention~~ is sufficient warrant for the detention of the ~~defendant~~ probationer if the probation and parole
21 officer delivers the written statement within 12 hours of the ~~defendant's~~ probationer's arrest. The
22 probation and parole officer, after making an arrest, shall present to the detaining authorities a similar
23 statement of the circumstances of violation.

24 ~~(3) Provisions regarding release on bail of a person charged with a crime are applicable to the~~
25 ~~defendants arrested under these provisions.~~

26 ~~— (4) Any probation and parole officer may hold a defendant arrested under subsection (1) without~~
27 ~~bail for 72 hours. After the arrest of the defendant pursuant to this subsection, a hearings officer for the~~
28 ~~probation and parole bureau shall hold a hearing within 36 hours of the defendant's arrest. The hearings~~
29 ~~officer shall determine whether there is probable cause to believe that the defendant has violated a~~
30 ~~condition of probation and, if probable cause exists, notify the sentencing court and determine an~~

1 ~~appropriate plan to ensure the defendant's compliance with the conditions of probation. An appropriate~~
2 ~~plan may include:~~

3 ~~—— (a) holding the defendant for a period of time up to 30 days, with credit for any time served from~~
4 ~~the time of the arrest to the time of the hearing to determine probable cause;~~

5 ~~—— (b) a request to the court pursuant to 46-23-1011 to modify the defendant's terms or conditions~~
6 ~~of probation; or~~

7 ~~—— (c) a notification to the court with jurisdiction over the defendant pursuant to 46-23-1013.~~

8 ~~—— (5) The department shall adopt policies and procedures to implement a probation violator prison~~
9 ~~diversion program. If the department is able to sufficiently sanction a defendant with a term in a detention~~
10 ~~center as provided in subsection (4)(a) for a proven technical violation that could result in the revocation~~
11 ~~of a suspended or deferred sentence, the department may pay the expense of the detention center costs~~
12 ~~and pursue payment of costs by the defendant as provided in 7-32-2245. If the action plan developed for~~
13 ~~the defendant proceeds as provided in subsection (4)(b) or (4)(c), the expenses of the detention must be~~
14 ~~paid as provided in 7-32-2242.~~

15 (3) A probation and parole officer may authorize a detention center to hold a probationer arrested
16 under this section without bail for 72 hours. Within 72 hours following the probationer's detention, the
17 probation and parole officer shall:

18 (a) authorize the detention center to release the probationer;

19 (b) hold an intervention hearing pursuant to [section 6]; or

20 (c) arrange for the probationer to appear before a magistrate to set bail. In setting bail, the
21 provisions of chapter 9 of this title regarding release on bail of persons charged with a crime apply.

22 (4) If the probationer is detained and bond is set, the probation and parole officer shall file a report
23 of violation within 10 days of the arrest of the probationer.

24 (5) After the probation and parole officer files a report of violation, the court may proceed with
25 revocation of probation in the manner provided in 46-18-203."

26
27 NEW SECTION. Section 6. Informal probation violation intervention hearing. (1) A probation and
28 parole officer who reasonably believes that a probationer has violated a condition of probation may initiate
29 an informal probation violation intervention hearing to gain the probationer's compliance with the
30 conditions of probation without a formal revocation hearing under 46-18-203.

(2) A hearings officer designated by the department shall conduct the intervention hearing.

(3) If the hearings officer determines by a preponderance of the evidence that the probationer has violated a condition of probation, the hearings officer may order the probationer to serve up to 30 days in a county detention center and order the probationer to pay the costs of incarceration. The department shall pay the incarceration costs not paid by the probationer.

(4) The provisions of chapter 9 of this title regarding release on bail of a person charged with a crime are not applicable to a probationer ordered to be held in a county detention center under this section.

NEW SECTION. **Section 7. Repealer.** Section 46-23-1013, MCA, is repealed.

NEW SECTION. **Section 8. Codification instruction.** [Section 6] is intended to be codified as an integral part of Title 46, chapter 23, part 10, and the provisions of Title 46 apply to [section 6].

NEW SECTION. **Section 9. Effective date.** [This act] is effective on passage and approval.

NEW SECTION. **Section 10. Retroactive applicability.** [This act] applies retroactively, within the meaning of 1-2-109, to offenders who are under the custody or supervision of the department of corrections on [the effective date of this act].

- END -

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 57th LEGISLATURE - REGULAR SESSION COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN JIM SHOCKLEY**, on January 10, 2001 at 8:00 A.M., in Room 137 Capitol.

ROLL CALL

Members Present:

Rep. Jim Shockley, Chairman (R)
Rep. Paul Clark, Vice Chairman (D)
Rep. Jeff Laszloffy, Vice Chairman (R)
Rep. Darrel Adams (R)
Rep. Gilda Clancy (R)
Rep. Aubyn A. Curtiss (R)
Rep. Bill Eggers (D)
Rep. Steven Gallus (D)
Rep. Gail Gutsche (D)
Rep. Christopher Harris (D)
Rep. Linda Holden (R)
Rep. Joan Hurdle (D)
Rep. Jeff Mangan (D)
Rep. Brad Newman (D)
Rep. Mark Noennig (R)
Rep. Ken Peterson (R)
Rep. Diane Rice (R)
Rep. Bill Thomas (R)
Rep. Merlin Wolery (R)
Rep. Cindy Younkin (R)

Members Excused: None.

Members Absent: None.

Staff Present: John MacMaster, Legislative Branch
Mary Lou Schmitz, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: **HB 119 - 1-05-01**

HB 151 - 1-05-01

Executive Action: **HB 29 DPAA - HB 104 DPAA**

occurs in the hearing process is the board designates a hearing officer. The hearing officer conducts the interview, takes notes, has a progress and conduct report from the facility, normally a psychological evaluation, and a board staff report. That information is submitted to the full board when they meet at the end of the month.

{Tape : 1; Side : A; Approx. Time Counter : 0.1 - 10.7}

When the hearing is conducted, the hearing officer takes notes, issues a recommended disposition to the Hearing Board to review the case and make the final decision.

Reps. Noennig, Hurdle, Gutsche, Mangan and Shockley asked Mr. Thomas for further clarification.

Closing by Sponsor: Rep. Vick closed the Hearing on HB 119.

HEARING ON HB 151

Sponsor: Rep. Brad Newman, HD 38 handed out EXHIBIT(1) and advised the committee that he is sponsoring the Bill at the request of the Department of Corrections and specifically the folks who operate the probation parole aspects of that department. The Bill is important for a number of reasons:

1) It helps conform and clarify the statutes on who exactly is under the supervision of the Department of Corrections. He wants to make sure that prosecutors, defense attorneys and judges have clear guidance in this area and for the Department of Corrections. The felony offenders and misdemeanor offenders should be remanded to the custody of local officials. There is statutory protection already in place, adopted by this Committee and the body as a whole, for local misdemeanor probation offices.

2) Additionally this Bill eliminates a conflict in the statutes governing modification of probation conditions, specifically Section 46-18-203, EXHIBIT(1)

{Tape : 1; Side : A; Approx. Time Counter : 10.7 - 30.1}

{Tape : 1; Side : B; Approx. Time Counter : 0.1 - 15.1}

Proponents: Mary Fay, Probation Bureau Chief, Department of Corrections said much of the Bill is clarification language, although there are some other significant changes. The first significant issue of the Bill deals with eliminating the ability for district court judges to order pre-sentence investigations on misdemeanor offenders. The Bureau has limited resources and, in her opinion, the resources should be used for those convicted of

felony offenses which are more serious than misdemeanors. The next significant issue of this Bill deals with providing the court with the ability to add or modify conditions of provisions without the court finding a violation. This bill also allows for the Department to request the court to set conditions of probation.

Dave Boyd, Department of Corrections, Parole Officer, Butte cited some cases in his jurisdiction.

Christy Brothers, Probation and Parole Officer, Butte spoke of a case in her area and felt this Bill would provide adequate supervision and provide for community safety.

Mike Ferriter, Administrator, Community Corrections Division said Probation and Parole is a unit within the unit he administers. In his opinion, this Bill simply adds tools for the probation and parole officers to carry out their duties and he feels it is his role to provide and assist officers with the appropriate tools in order for them to keep offenders in compliance with the conditions of probation and parole. Overall, their mission is to provide public safety and trust. These adjustments to the statutes will go a long way in allowing probation and parole to fulfill their duties and obligations.

Opponents: None

Questions from Committee Members and Responses: **Rep. Laszloffy** asked **Rep. Newman** if there is ever a case where somebody convicted has additional time added to their sentence after original sentencing and that additional time goes beyond the maximum allowed for that crime in statute? **Rep. Newman** said he knows of no such case that wouldn't be immediately reviewed by the Montana Supreme Court.

{Tape : 1; Side : B; Approx. Time Counter : 15.1 - 30.1}

Rep. Noennig to **Rep. Newman** for clarification concerning double jeopardy conditions. **Rep. Newman** said no, it does not exist.

Reps. Holden, Mangan, Hurdle, Clark, Peterson, Harris, Thomas, Eggers, Shockley to **Ms. Fay** for clarification, **EXHIBIT(2)**; and **Rep. Newman** concerning the fiscal impact. As of this date no fiscal note has been issued. Further questions of clarification of the Bill were referred to **Rep. Newman** concerning the constitutional issue of double jeopardy.

{Tape : 2; Side : A; Approx. Time Counter : 0.1 - 29.5}

Closing by Sponsor: Rep. Newman closed the Hearing on HB 151. He appreciated the fact the committee members are willing to look at this Bill in detail and willing to help him work out a practical solution to this problem. They are trying to strike a balance that both protects the public and is fiscally responsible while still empowering the Department of Corrections to do the job it is mandated to do.

EXECUTIVE ACTION ON HB 29

Motion: REP. NOENNIG moved that HB 29 DO PASS. #1

Motion: REP. NOENNIG moved that HB 29 BE AMENDED. EXHIBIT(3) #2

Discussion: Rep. Noennig explained the amendment concerning rights of landlords and tenants concerning damages and refunds.

{Tape : 3; Side : A; Approx. Time Counter : 0.1 - 4.4}

Vote: Motion on Amendment EXHIBIT(3) carried unanimously. 20-0

Motion/Vote: REP. NOENNIG moved that HB 29 DO PASS AS AMENDED. #3
Motion carried unanimously. 20-0

EXECUTIVE ACTION ON HB 104

Motion: REP. CLARK moved that HB 104 DO PASS. #4

Motion/Vote: REP. NOENNIG moved that HB 104 BE AMENDED.
EXHIBIT(4) #5. Motion carried unanimously. 20-0

Motion: REP. HARRIS moved that HB 104 BE AMENDED. #6
An erroneous sentence or erroneous disposition is one that is erroneous as a matter of law. A sentence imposed in an illegal manner is one that is legal but was not imposed as required by law.

{Tape : 3; Side : A; Approx. Time Counter : 4.4 - 17}

Discussion: John MacMaster gave procedural information and lawful explanations to the committee concerning the amendment.

{Tape : 3; Side : B; Approx. Time Counter : 0.1 - 5.8}

Motion: REP. GALLUS moved a substitute motion that HB 104 BE AMENDED. #7. This amendment would strike "except" insert "that", Part 1 of the amendment. Rep. Gallus withdrew his substitute motion.

HB 151

EXHIBIT 1
DATE 1-10-01
HB 151

Rep. Brad Newman (D-Butte) Sponsor

A Clean-Up of Probation Statutes

- **Eradicates the conflict between 46-18-203 and 46-23-1011**
 - 46-18-203 says a judge can't add or modify conditions of probation until the probationer violates
 - 46-23-1011 says a judge can modify conditions "at any time"
 - HB 151 changes 46-18-203 to allow a judge to add or modify conditions without first finding a violation
- **Adds a mechanism by which a judge may set, add or modify conditions of probation after sentencing**
 - Some older judgments have no conditions; P&P officers can't supervise
- without conditions
- P&P officers sometimes need new or modified conditions to supervise better
- Mechanism conforms to due process mandates
- **Clarifies for which offenders DOC can do pre-sentences and which offenders DOC can supervise**
 - 53-1-202 only allows DOC to do pre-sentences and supervise **felony** offenders
 - HB 151 conforms other statutes to match
- **Separates the probation violator diversion program from 46-23-1012**
 - Procedure was confusing as part of 46-23-1012.
- **Cleans up the main probation statutes, 46-23-1011 and 46-23-1012 and clarifies:**
 - who can arrest a probationer
 - that P&P officers may issue a warrant
 - that a P&P officer may hold a probationer for 72 hrs while the officer investigates a violation
 - that after 72 hrs the officer must arrange for a bail hearing
 - when an officer must file a report of violation
- **Repeals 46-23-1013**
 - It duplicated and in some cases contradicted 46-18-203 and was unnecessary.

JAIL SANCTIONS-PROBATION VIOLATION PRISON DIVERSION

The 1999 Legislature was greatly concerned about the number of probation offenders were revoked by the court and sent to prison. In response to this concern, the legislature codified statute, "46-23-1012. *Arrest when violations of probation alleged-probation compliance plan-probation violator prison diversion program.*"

This statute allows for the Probation & Parole Bureau to use an administrative intervention hearing to sanction probationers to jail for up to 30 days in order to:

- ❖ Gain compliance with the courts' order and probation conditions.
- ❖ Hold the probationer accountable for technical violations.
- ❖ Provide an immediate and meaningful consequence for violations.
- ❖ Keep the probationer from returning to the court for further court action.
- ❖ Divert the probationer from a prison sentence.
- ❖ Maintain the probationer safely in the community.

JAIL SANCTIONS FOR FY 00 AND FY 01

JAIL DATA

Jail costs (# of day X Jail Rates)	\$72,391.90
DOC paid to JAILS	\$29,593.20

OFFENDER DATA

Amount offenders ordered to pay	\$43,524.58
Jail Costs paid by offenders	\$6389.30
Amount offenders owe to DOC	\$37,135.28

Number of offenders ordered to pay	167 offenders (approximately 75%)
Total number of offenders given jail sanctions	224 offenders
Average length of Jail Sanction	6.8 days
Total number of days Offenders sanctioned in jail	1,525 days

Jim Oppedahl, Executive Director, Montana Board of
Crime Control.

Rep. Brad Newman, HD 38, Butte

Opponents: None

Questions from Committee Members and Responses: Reps. Peterson,
Shockley to Ms. Bucy.

Closing by Sponsor: Rep. Gutsche closed the Hearing on HB 336.

{Tape : 3; Side : A; Approx. Time Counter : 10.5 - 21}

EXECUTIVE ACTION ON HB 336

Motion/Vote: REP. NEWMAN moved that HB 336 DO PASS. #1 Motion
carried unanimously 19-0.

EXECUTIVE ACTION ON HB 151

Motion: REP. EGGERS moved that HB 151 DO PASS. #2

Discussion: Reps. Mangan, Newman. (Mangan amendment already on
the Bill)

Motion: REP. EGGERS moved that HB 151 DO PASS AS AMENDED. #3

Motion: REP. SHOCKLEY moved that HB 151 BE AMENDED to segregate
#10 from the group. #4 EXHIBIT(juh25a04)

Discussion: Rep. Shockley and Mr. MacMaster explained the
amendments. Reps. Eggers, Newman.

{Tape : 3; Side : A; Approx. Time Counter : 21 - 30.2}

{Tape : 3; Side : B; Approx. Time Counter : 0.1 - 18.9}

Vote: Motion #4, Shockley amendment, carried 19-1 with Rep.
Mangan voting no:

Motion: REP. SHOCKLEY moved that HB 151 DO PASS AS AMENDED. #5

Motion: REP. SHOCKLEY moved that HB 151 BE AMENDED. 1-9 and 11-
13. #6

Discussion: Reps. Thomas, Shockley, Eggers, Newman, Gallus, Mangan, Hurdle, Gutsche, Harris, Laszloffy, Peterson.

{Tape : 3; Side : B; Approx. Time Counter : 4.9 - 29.5}

{Tape : 4; Side : A; Approx. Time Counter : 0.1 - 29.8}

{Tape : 4; Side : B; Approx. Time Counter : 0.1 - 3.1}

Vote: Motion #6 failed 8-12 with Reps. Clark, Curtiss, Eggers, Gallus, Gutsche, Harris, Holden, Mangan, Newman, Noennig, Peterson and Younkin voting no.

Motion: REP. SHOCKLEY moved that HB 151 DO PASS AS AMENDED. #7

Discussion: Reps. Harris, Noennig, Newman, Shockley, Peterson, Hurdle.

Motion/Vote: REP. HARRIS moved that HB 151 BE POSTPONED. #8
Motion failed 2-16 with Reps. Shockley, Laszloffy, Clark, Adams, Clancy, Curtiss, Eggers, Gallus, Gutsche, Mangan, Newman, Noennig, Peterson, Rice, Thomas and Wolery voting no.

Motion/Vote: REP. SHOCKLEY moved that HB 151 DO PASS AS AMENDED.
#9. Motion failed on a tie vote 10-10.

Motion/Vote: REP. NOENNIG moved that HB 151 BE TABLED. #10
Motion carried 19-1 with Rep. Newman voting no.

{Tape : 4; Side : B; Approx. Time Counter : 3.1 - 19}

Motion/Vote: REP. PETERSON moved that HB 323 BE TABLED. #15
Reverse vote, without objection. Motion carried 17-3 with Reps.
Shockley, Holden and Younkin voting no.

EXECUTIVE ACTION ON HB 471

Motion: REP. PETERSON moved that HB 471 DO PASS. #16

Motion: REP. PETERSON moved that HB 471 BE AMENDED. #17
EXHIBIT(juh38a03)

Discussion: Reps. Peterson, Mangan, Laszloffy, Shockley, Curtiss,
Clancy, Newman.

Vote: Motion #17, Peterson amendment carried unanimously 20-0.

Motion/Vote: REP. PETERSON moved that HB 471 DO PASS AS AMENDED.
#18. Motion carried unanimously 20-0.

EXECUTIVE ACTION ON HB 313

Discussion: Rep. Newman explained the amendments and concerns
with the professional people.

Reps. Hurdle, Mangan, Clark. At the request of the Chairman,
Rep. Shockley, Reps. Mangan and Clark will work out amendments
and then consideration will be taken on HB 313.

{Tape : 2; Side : B; Approx. Time Counter : 4 - 29.7}
{Tape : 3; Side : A; Approx. Time Counter : 0.1 - 2.7}

EXECUTIVE ACTION ON HB 151

Motion: REP. HARRIS moved that HB 151 BE TAKEN OFF THE TABLE. #19
Motion carried 14-5 with Reps. Shockley, Laszloffy, Adams,
Curtiss and Rice voting no.

Discussion: Reps. Harris, EXHIBIT(juh38a04) Younkin.

Motion/Vote: REP. HARRIS moved that HB 151 DO PASS AS AMENDED.
#20 Motion carried 15-5.

Discussion: Reps. Shockley, Gutsche, Harris, Mangan, Newman,
Laszloffy, Noennig, Clark, Peterson, Younkin.

Discussion: Reps. Thomas, Shockley, Eggers, Newman, Gallus, Mangan, Hurdle, Gutsche, Harris, Laszloffy, Peterson.

{Tape : 3; Side : B; Approx. Time Counter : 4.9 - 29.5}

{Tape : 4; Side : A; Approx. Time Counter : 0.1 - 29.8}

{Tape : 4; Side : B; Approx. Time Counter : 0.1 - 3.1}

Vote: Motion #6 failed 8-12 with Reps. Clark, Curtiss, Eggers, Gallus, Gutsche, Harris, Holden, Mangan, Newman, Noennig, Peterson and Younkin voting no.

Motion: REP. SHOCKLEY moved that HB 151 DO PASS AS AMENDED. #7

Discussion: Reps. Harris, Noennig, Newman, Shockley, Peterson, Hurdle.

Motion/Vote: REP. HARRIS moved that HB 151 BE POSTPONED. #8

Motion failed 2-16 with Reps. Shockley, Laszloffy, Clark, Adams, Clancy, Curtiss, Eggers, Gallus, Gutsche, Mangan, Newman, Noennig, Peterson, Rice, Thomas and Wolery voting no.

Motion/Vote: REP. SHOCKLEY moved that HB 151 DO PASS AS AMENDED. #9. Motion failed on a tie vote 10-10.

Motion/Vote: REP. NOENNIG moved that HB 151 BE TABLED. #10

Motion carried 19-1 with Rep. Newman voting no.

{Tape : 4; Side : B; Approx. Time Counter : 3.1 - 19}

Motion/Vote: REP. PETERSON moved that HB 323 BE TABLED. #15
Reverse vote, without objection. Motion carried 17-3 with Reps.
Shockley, Holden and Younkin voting no.

EXECUTIVE ACTION ON HB 471

Motion: REP. PETERSON moved that HB 471 DO PASS. #16

Motion: REP. PETERSON moved that HB 471 BE AMENDED. #17
EXHIBIT(juh38a03)

Discussion: Reps. Peterson, Mangan, Laszloffy, Shockley, Curtiss,
Clancy, Newman.

Vote: Motion #17, Peterson amendment carried unanimously 20-0.

Motion/Vote: REP. PETERSON moved that HB 471 DO PASS AS AMENDED.
#18. Motion carried unanimously 20-0.

EXECUTIVE ACTION ON HB 313

Discussion: Rep. Newman explained the amendments and concerns
with the professional people.

Reps. Hurdle, Mangan, Clark. At the request of the Chairman,
Rep. Shockley, Reps. Mangan and Clark will work out amendments
and then consideration will be taken on HB 313.

{Tape : 2; Side : B; Approx. Time Counter : 4 - 29.7}

{Tape : 3; Side : A; Approx. Time Counter : 0.1 - 2.7}

EXECUTIVE ACTION ON HB 151

Motion: REP. HARRIS moved that HB 151 BE TAKEN OFF THE TABLE. #19
Motion carried 14-5 with Reps. Shockley, Laszloffy, Adams,
Curtiss and Rice voting no.

exhib.

Discussion: Reps. Harris, EXHIBIT(juh38a04) Younkin.

Motion/Vote: REP. HARRIS moved that HB 151 DO PASS AS AMENDED.
#20 Motion carried 15-5.

Discussion: Reps. Shockley, Gutsche, Harris, Mangan, Newman,
Laszloffy, Noennig, Clark, Peterson, Younkin.

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ELECTRONIC CITATION: 1997 FED App. 0076P (6th Cir.)

File Name: 97a0076p.06

Nos. 96-1505/1956

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEONARD LOWENSTEIN,

Defendant-Appellant.

>

ON APPEAL from the United States District Court for the Eastern District of
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Decided and Filed February 25, 1997

Before: KENNEDY, NELSON, and GODBOLD [*], Circuit Judges;

KENNEDY, Circuit Judge. In these consolidated appeals, defendant appeals the District Court's (1) modification of the terms of his supervised release, and (2) subsequent revocation of his supervised release. Defendant

argues that the District Court could not modify the terms of his supervised release without first finding that he had violated one of those terms. Defendant further argues that the evidence does not support either the violation finding upon which the modification is based, or the violation finding upon which the subsequent revocation is based. For the following reasons, we AFFIRM the modification and subsequent revocation of defendant's supervised release.

From March through October, 1991, defendant telephoned death threats to a state assistant attorney general who had been attempting to collect inheritance taxes on the estate of the father of defendant. Based upon this conduct, a jury convicted defendant on June 10, 1992 of one count of transmitting a threatening communication, in violation of 18 U.S.C. § 875(c). The District Court sentenced defendant to forty-eight months of incarceration and a three-year term of supervised release. Defendant unsuccessfully appealed his conviction and sentence. *See United States v. Lowenstein*, 1 F.3d 452 (6th Cir. 1993).

On April 28, 1995, defendant began to serve his term of supervised release. On January 15, 1996, the United States Department of Probation ("Probation Department") granted defendant permission to travel to Florida between January 20, 1996 and January 28, 1996. On January 18, 1996, however, the Probation Department petitioned the District Court to issue a summons; the petition alleged that defendant had violated the terms of his supervised release on August 10, 1995 by leaving the judicial district without permission and travelling to Miami, Florida. The District Court issued the requested summons on February 20, 1996.

The District Court held a violation hearing on March 27, 1996. Through counsel, defendant filed a motion to dismiss the petition to hold him in violation, arguing that the government's delay in bringing the petition and its grant of permission to defendant to travel to Florida in January, 1996 estopped it from bringing the violation charge.

Defendant neither admitted nor denied in his motion that he travelled to Florida in August, 1995.

At the violation hearing, counsel for defendant reasserted the estoppel argument, and the government and the Probation Officer argued that defendant had violated the terms of his supervised release by leaving the judicial district without permission in August, 1995. The District Court stated that it was much less disturbed by the allegation that defendant had travelled without permission than by a letter which it had received from the Probation Department and which defendant had reviewed. This letter described threatening phone calls made by defendant in November, 1995 to the assistant attorney general involved in the earlier conviction and a state court judge.

The District Court denied the motion to dismiss and found that defendant in fact had violated the terms of his supervised release by leaving the judicial district without permission. It did not state on what evidence it relied. Rather than revoking defendant's supervised release, however, the District Court modified its terms by prohibiting defendant from making "harassing or otherwise inappropriate contact with, or telephone calls to, any judge, attorney, or other person." Defendant thereafter filed a timely notice of

appeal of the modification.

On June 27, 1996, the Probation Department petitioned the District Court to issue another summons, alleging that defendant had violated the amended term of his supervised release on May 9, 1995 by placing a harassing phone call to Jill Daly, an attorney for the Oakland County Probate Court.

A hearing on the summons was held on June 27, 1996. Because Daly, the witness to the harassing call, was not present, the hearing was rescheduled to July 17, 1996.

At the July 17, 1996 hearing, Daly testified that she had become acquainted with defendant when she had worked as an attorney in the Probate Estates Division of Oakland County Probate Court. Daly confirmed that defendant had

called her on May 9, 1996 and that she had transcribed their conversation. The District Court read into the record her transcription, which in part stated the following:

[Defendant] claims his daughter took his money while he was in prison and that she will pay for that. He further says several other people will pay. He says this is not a threat, this is a promise. Included in his threat list are, of course, D____ K____, that low life s____-of-a-b____ tax collecting piece of s____, [state court judges] F.X. O'Brien [and] Hilda Gage, [Magistrate Judge] Paul Komives and [District Court Judge] Horace Gilmore, all with varying degrees of obscenities. He had kind words for Hugh Dean. He is a good man.

Daly testified that after she notified the Probation Department of this call, her previously cordial relationship with defendant changed. Specifically, defendant left Daly a message on her voicemail on May 24, 1996. Daly confirmed that she prepared the following transcription of that message:

Thanks for the good advice you gave me about, you know, forgetting everything and going on with it. Ah, I'm sure going to try it. I wonder, I wonder how you'd handle it if you got f____ over for no reason and had all your money cleaned out, you know, by forgeries with the help of the bank and came out and you were destitute and in the streets. Hey, thanks for the good advice, Jill, and ah, I'm going to follow it. Call me if you have anything you want to add. I can be reached at 313-____-____. Enjoy your lunch. Enjoy your status and position. Ah, and Ah, God forbid you should ever have to walk in somebody else's shoes cause your feet might hurt. They might get hurt. But thanks for the good advice, Jill. So long.

Likewise, Daly confirmed that defendant left another message on her voicemail on June 28, 1996. This message stated:

Jill, this is Lenny and I am truly disappointed in you as a human being. I truly am. And I want you to share some of the responsibility for my suicide if I do tend, if I do commit suicide. You are a no good piece of s____ c____-sucker, Jill, and ah, that is the best, basest thing I can say about you. So long.

Daly had recorded this final message on tape, and it was played at the hearing.

During cross-examination, Daly stated that neither the May 9, 1996 conversation nor the May 24, 1996 voicemail message contained a threat directed at her. Daly identified the caller as defendant, with whom she had dealt many times between the late 1980's and 1991. She was able to identify him from the use of a nickname he had used previously. Daly also testified that after she had realized during the May 9, 1996 conversation that she was speaking to defendant, she said "Oh, it's Lenny," and the caller agreed. Defendant neither produced witnesses nor testified on his own behalf at the hearing.

The District Court found that defendant had violated the amended term of his supervised release by placing harassing calls to Daly on May 9, May 24, and June 28, 1996. Accordingly, the District Court revoked his supervised release and imposed a sentence of ten months of incarceration. Defendant filed another timely notice of appeal of the revocation and sentence.

A. March, 1996 modification of terms

Defendant asserts that the doctrine of estoppel barred the government from petitioning the District Court in January, 1996 to revoke or modify the terms of his supervised release based upon his alleged trip to Florida in August, 1995. Specifically, he argues that "the Probation Department's conduct in not timely reporting the violation to the district court and subsequently granting written permission for future travel constituted 'retroactive permission' to travel outside of the jurisdiction in August, 1995." Defendant cites *Cox v. Louisiana*, 379 U.S. 559

(1965), and *Raley v. Ohio*, 360 U.S. 423 (1959), for the proposition that the defense of entrapment by estoppel bars the government from holding an individual criminally responsible for conduct which government officials explicitly have approved.

This assertion is without merit. Both *Cox* and *Raley* involved facts in which the government had told the defendants in those cases that a certain activity was acceptable *before* they undertook it. See *Cox*, 379 U.S. at 571 (city officials told defendant he could demonstrate near a courthouse before he did so); *Raley*, 360 U.S. at 426, 438-39 (legislators told witnesses that they could rely on privilege against self-incrimination; witnesses later received convictions for contempt for having invoked that privilege); see also *United States v. Levin*, 973 F.2d 463, 468 (6th Cir. 1992) (entrapment by estoppel applies only when defendant reasonably relied upon a pronouncement by government that the charged criminal act was legal). The government, however, never suggested to defendant that he could travel to Florida in August, 1995.

Defendant also argues that there was insufficient evidence to support the finding by the District Court that he violated the terms of his release by leaving the district without permission. We agree with defendant that the record contains no testimony or documentary evidence that defendant travelled to Florida in August, 1995. In making its factual determination, the District Court relied solely upon a hearsay statement contained in the petition compiled by the Probation Officer. Although a finding that a defendant violated the terms of his supervised release may rest upon reliable hearsay evidence, see FED. R. EVID. 1101(d)(3); *United States v. Stephenson*, 928 F.2d 728, 732 (6th Cir. 1991), the petition compiled by the Probation Officer merely asserts, without further detail or explanation, that defendant left the judicial district without permission on August 10, 1995. The petition does not mention the factual basis for the belief of the Probation Officer. Such an accusation, standing alone, lacks the indicia of reliability which would allow it to justify a

finding that defendant actually left the district without permission. See *Stephenson*, 928 F.2d at 732-33 (district court abused its discretion holding that defendant violated his supervised release where evidence did not permit finding that defendant committed charged assault and neither order nor judge's statements referred to the evidence upon which the court relied); see also *United States v. Silverman*, 976 F.2d 1502, 1512-13 (6th Cir. 1992) (en banc) (during sentencing, district court may consider hearsay evidence only if it has "some minimal indicium of reliability" to support its accuracy; mere allegation in indictment will not suffice).

As an alternative basis for affirmance, however, the government argues that the District Court did not have to find initially that defendant had violated a term of his supervised release before modifying the terms of that release. The statute governing modification of supervised release conditions, 18 U.S.C. §

3583(e)(2), provides in pertinent part that a district court

may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision[.]

In contrast, the statute which governs the revocation of supervised release provides that revocation is possible only when

the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, *finds by a preponderance of the evidence that the defendant violated a condition of supervised release*

See 18 U.S.C. § 3583(e)(3)(emphasis added). Moreover, the Federal Rule of Criminal Procedure referred to in

§ 3583(e)(2), Rule 32.1(b), imposes only the following procedural requirements:

(b) Modification of Probation or Supervised Release. A hearing and assistance of counsel are required before the terms or conditions of probation or supervised release can be modified, unless the relief to be granted to the person on probation or supervised release upon the person's request or the court's own motion is favorable to the person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation or supervised release is not favorable to the person for the purposes of this rule.

The literal language of Rule 32.1(b) therefore impose no requirement that a court modifying the conditions of supervised release first find that the defendant has violated a condition of his supervised release.

Defendant responds that the first sentence of 18 U.S.C. § 3583(e) generally directs courts deciding whether to terminate, extend, modify, reduce or revoke terms of supervised release to consider factors detailed in various other statutory sections, including 18 U.S.C. § 3553(a)(4), which in turn refers to the policy statements issued by the United States Sentencing Commission regarding the violation of probation or supervised release. See 18 U.S.C. §§ 3553(a)(4)(B); 3583(e). The policy guideline applicable to the revocation of probation or supervised release, United States Sentencing Commission Guideline ("U.S.S.G.") § 7B1.3(a)(2), in turn states that modification is a possible penalty for a Grade C supervised release violation, such as the violation here at issue. He argues that if modification is an appropriate penalty for a violation, it cannot be imposed absent a finding of a violation.

Defendant's reliance upon U.S.S.G. § 7B1.3(a)(2) is misplaced. The policy statement does not provide that a violation is a necessary prerequisite to modification; rather,

it merely states that a violation may justify a modification. Further, the policy statement is only one of many factors which a sentencing court may consider when it is deciding whether to pursue one of the several options governed by 18 U.S.C. § 3583(e). Moreover, even if § 7B1.3(a)(2) did provide that modification of supervised release requires a finding of a supervised release violation, the policy statements in Chapter 7 of the Sentencing Guidelines are not mandatory requirements. See *United States v. West*, 59 F.3d 32, 35-36 (6th Cir.), cert. denied, 116 S.Ct. 486 (1995).

Accordingly, the provisions of § 3583(e)(2) and Rule 32.1(b) demonstrate that a court can modify the

conditions of a defendant's supervised release regardless of whether the defendant has violated his existing conditions. Further, the fact that § 3583(e)(2) and Rule 32.1(b) are intended to allow courts to respond flexibly to unforeseen changes in the circumstances of a defendant [1] likewise indicates that a violation of an existing supervised release term does not have to precede a modification. For example, if a defendant begins contacting the victim of the crime for which he was convicted during his period of supervised release, it could be reasonable for the sentencing court to impose a new prohibition against contacting the victim, even though the defendant previously had been honoring every term of his supervised release. Moreover, allowing modification only when a defendant has committed an existing violation would create an incentive, onerous to both law enforcement officials and defendants, to make the initial terms of a defendant's supervised release as comprehensive as possible. So long as the modifications meet the standard required of initial terms of supervised release, i.e., that they are reasonably related to the goals of

rehabilitation of the defendant and the protection of the public, *see United States v. Berridge*, 74 F.3d 113, 118 (6th Cir. 1996), they will be upheld.

B. July, 1996 revocation

Defendant also argues that sufficient evidence failed to support the decision of the District Court at the July 17, 1996 hearing to revoke his supervised release and sentence him to ten months of incarceration because he had violated the amended condition of his supervised release by placing harassing phone calls to Jill Daly on May 9, May 24, and June 28, 1996.

A sentencing court may revoke a term of supervised release and incarcerate the defendant when "the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release." *See* 18 U.S.C. § 3583(e)(3). The same procedural requirements applicable to hearings regarding revocation of parole apply to hearings regarding revocation of supervised release. *Stephenson*, 928 F.2d at 732. Those requirements are:

(a) written notice of the claimed violation of parole; (b) disclosure to the parolee [individual on supervised release] of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. (emphasis deleted)(quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)). [2] In order to revoke supervised release, the sentencing court must find by a preponderance of the evidence that a defendant has violated a condition of his supervised release. *See id.* at 733. Once this finding is made, whether defendant's probation or supervised release should be revoked is reviewed for an abuse of discretion. *See id.* at 731-32.

Defendant argues that, "while Ms. Daly's testimony may have been sufficient to establish the existence of the charged May 9, 1996 telephone call, her testimony does not establish that the call was a 'harassing' telephone call." The District Court, however, did not err in concluding that defendant had made "harassing" calls which violated the amended condition of his supervised release. Although Daly testified upon cross-examination that the May 9, 1996 call and the May 24, 1996 voicemail message contained no threats directed at her, they did contain obscenities and displayed marked hostility, the May 24, 1996 message expressing hostility to Daly in particular. Consequently, even if the calls did not express actual

threats of violence directed at Daly herself, the District Court did not err in reaching that conclusion.

Defendant never discusses whether the May 24 and June 28, 1996 messages could constitute violations of his amended supervised release condition. He possibly assumes that the messages are not at issue because the petition did not refer to them specifically. The government filed its petition, however, before defendant left the June 28, 1996 message. Further, defendant received notice that these two messages were at issue during the discontinued July 15, 1996 hearing, at the latest, when government counsel discussed the memo prepared by Daly regarding these messages. Defendant also had the opportunity during

the July 17, 1996 hearing to cross-examine Daly regarding the two messages and the District Court specifically found that they violated the amended supervised release term. The District Court therefore properly based the revocation of defendant's supervised release upon all three harassing calls.

Accordingly, we AFFIRM the modification and subsequent revocation of defendant's supervised release.

FOOTNOTES

[*]

The Honorable John C. Godbold, Circuit Judge of the United States Court of Appeals for the Eleventh Circuit, sitting by designation.

[1] See FED. R. CRIM. P. 32.1(b) advisory committee's note, which explains that "[p]robation conditions should be subject to modification, for the sentencing court must be able to respond to changes in the probationer's circumstances as well as new ideas and methods of rehabilitation."

[2] FED. R. CRIM. P. 32.1(a)(2) reiterates the first four of these six requirements and further requires notice of the right to be represented by counsel.

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MINUTES

MONTANA SENATE 57th LEGISLATURE - REGULAR SESSION COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on March 14, 2001
at 9:00 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. Duane Grimes, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Walter McNutt (R)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Branch
Cecile Tropila, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 219, HB 146, HJ 17, HB 151,
3/9/2001

HEARING ON HB 219

Sponsor: REP. JOE MCKENNEY, HD 49, GREAT FALLS

Proponents: Ronna Christman, MT Petroleum Marketers Assoc.
Tim Sweeney, Shamrock Stores, Missoula
Richard Clark, Kwik-Way Stores Inc., Billings

Opponents: None

Opening Statement by Sponsor:

REP. BRAD NEWMAN, HD 38, BUTTE, briefed the juvenile detention centers and the funding. He explained this issue wasn't the responsibility of the Board of Crime Control. He felt they should reexamine assumptions made under current statutes and the priorities placed on both state and federal juvenile detention.

HEARING ON HB 151

Sponsor: REP. BRAD NEWMAN, HD 38, BUTTE

Proponents: Mary Fay, Department of Corrections
Valarie Wilson, Attorney, Jefferson County
Chad Field, Department of Corrections
Diana Liebinger Koch, Department of Corrections

Opponents: None

Opening Statement by Sponsor:

REP. BRAD NEWMAN, HD 38, BUTTE, pointed out areas of the bill where language had been changed for clarification. He mentioned the statutes 42-18-203 and 46-23-011 in the codes that conflict with the disparity. He talked about an incident these codes affected and how the court awarded the defendant needed intervention and the defendant did not complete the treatment. He felt the judge should have had a clause to use for the defendant to go through. He felt problems were occurring with the Department of Corrections and there was not enough time to work with this issue. He felt by removing the misdemeanor language from the statutes it would help address the disparity between the statutes.

{Tape 4; Side A}

Proponents' Testimony:

Mary Fay, Department of Corrections, handed in her testimony EXHIBIT(8).

Valarie Wilson, Attorney, Jefferson County, believed the provision of this bill clarifying the contradiction of the statutes was very important. She explained an incident of an offender and what the offender's prison time was. She pointed out sections of the statutes and compared the differences. She asked for the committee's support of the bill.

Chad Field, Department of Corrections, explained an incident with an offender and how this bill effects these issues. He felt the

offenders are in need of treatment and this bill addresses the risks needed before a violation occurs.

Diana Liebinger-Koch, Department of Corrections, handed out a memo of law **EXHIBIT(9)**. She handed out another memo/testimony **EXHIBIT(10)**. She also handed out a letter from the County Attorneys Association **EXHIBIT(11)**.

{Tape 4; Side B}

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. DOHERTY asked if there were some misdemeanors that need pre-sentencing for. **Mary Fay** felt all misdemeanors should receive pre-sentencing investigation completed on them. She said there is nothing in the statute at this time to supervise them.

SEN. DOHERTY asked if the bill does not violate double jeopardy, modifying the circumstances. **Diana Liebinger-Koch** answered that is correct and added they are dealing with a one criminal sentence, modifying the conditions by not imposing another punishment on the offender.

SEN. DOHERTY asked about the ex post facto issue and what was the rational. **Diana Liebinger-Koch** explained how the judge promote violations. She said the ex post facto issues do not add substantially to the measure of punishment.

SEN. GRIMES asked if the double jeopardy issue was a section in the constitution or was it more defined by statute. **Diana Liebinger-Koch** said the double jeopardy provision is found both in the Montana Constitution and the United States Constitution.

SEN. GRIMES asked if there were other statutes defining double jeopardy that would apply. **Diana Liebinger-Koch** said there is no other statute needing to be amended.

SEN. GRIMES asked if this was offering violation of probation to not be put into double jeopardy. **Diana Liebinger-Koch** explained the courts have interpreted this to mean two different things. She said they would not be able to try someone twice for the same criminal act and they could not inflict multiple punishments on someone for the same offense.

SEN. GRIMES asked if this would not violate the individual's rights in other sections on the same grounds. **Diana Liebinger-**

Koch said she would agree with this and said this is not another punishment.

SEN. GRIMES asked why language was being changed. **REP. NEWMAN** said there was no legal significance and they were trying to be consistent within the provisions of the bill.

SEN. GRIMES asked if there was any unintended consequences dealing with misdemeanors. **REP. NEWMAN** explained Montana statutes dealing with felons and how an unintended consequence does occur.

SEN. GRIMES asked about retroactive applicability and if it would apply to these cases. **REP. NEWMAN** said the intention of the bill is to make these work and they are working within the existing punishment the offenders are subjected to.

SEN. GRIMES asked about the time served. **REP. NEWMAN** said that time served on probation is more often credited as time served on the sentence.

Closing by Sponsor:

REP. BRAD NEWMAN, HD 38, BUTTE, summarized the conditions being modified and added. He mentioned the conflicts created within the statutes and how the legislature needs to offer guidance as to modify these conditions without violating existing sentencing.

HB 151 Probation & Parole Bill
Sponsored by:
Representative Brad Newman
Senate Judiciary Committee
Introduced- March 14, 2001

SENATE JUDICIARY
EXHIBIT NO. 8
DATE 03/14/01
FILE NO. HB151

Good morning!
Chairman Grosfield and members of the Committee:

My name is Mary Fay, I am the Bureau Chief for the Probation and Parole Bureau within the department of Corrections.

I want to thank Representative Brad Newman for sponsoring this bill and providing the committee with a thorough understanding of the effects of this legislation.

Many of the changes in this bill are simply clarifying present statutory language.

However I will go over the substantive issues of the bill one by one.

1. The first significant issue of this bill allows for district court judges to order Pre-Sentence Investigation on felony offenders only. This change conforms with the present language in 53-1-202 that authorizes the department of Corrections the manage felony offenders, only.

The issue, of course, is that the bureau has limited resources and in my opinion, our resources should be used for those convicted of the more serious felony offenses.

Presently there is a statute that clearly provides local governments with the ability to establish misd probation officers (46-23-1005). Missoula (145 offenders), Yellowstone (155 offenders) and Rosebud Counties have used this statute to develop misdemeanor officers.

2. The next significant change in this bill allows the sentencing judge to add or modify conditions of probation without the Judge finding that the offender has violated his/her probation with due process of course. As the statute stands, and as the Supreme Court has interpreted this, the court may only modify or add conditions if the Judge first finds that the probationer has violated probation. (St. v Nelson, 1998)

I believe that adding or modifying conditions to probation is actually preventative in nature and good public policy. At this time there is no provision that allows the sentencing judge to set, add or modify conditions after sentencing without first finding the offender has violated probation. This change does not allow the court to increase the punishment rather set conditions which will ultimately provide for public safety while assisting the offender to change and hopefully become a law abiding citizen.

The bureau deals with this situation weekly. It is problematic, mostly with older cases; and it usually involves sex offenders, who refused treatment at the prison, served their prison sentence and are now being released from prison to begin serving their probation.

One scenario goes like this: the offender is sentenced to prison and ordered by the court to complete several treatment programs. The court then suspends a portion of that sentence but neglects to order treatment as a condition. The offender goes to prison, refuses treatment, does his entire prison sentence and then is released to his suspended sentence on probation without any condition for treatment. The P&P Officer then has an untreated sex offender in your community with no ability to effectively manage the offender. I believe the public's safety is at risk with these cases. These offenders need to be in treatment in the community. At this time there is no provision in the statute to make that happen.

This bill also allows for the department to request the court to set conditions of probation. Again the situation arises when an offender is discharging a prison sentence and commencing supervision of their suspended portion of their sentence in the community. Some older judgments do not list the conditions of supervision. This bill provides a mechanism to set those conditions. The probationer is allowed to be present with legal counsel to contest any new or modified condition, that satisfies the due process mandates. Officers need probation conditions to safely and effectively supervise felony offenders.

The rest of that section specifically outlines the procedure as to how the modification or adding of these conditions is to be done. And it adds the county attorney into the equation.

Chad Field, Probation & Parole Supervisor will testify about a couple of difficult cases in more detail.

3. The next issue in the bill is elimination some of the language in 46-23-1011 that is simply unneeded. The DOC and P&P bureau already requires the officers to report the probationer's progress to the court. And the Administrative Rules M (ARM) require officers to give a copy of the rules to the offender.
4. In 1999 the legislature passed HB 115 (MCA 46-23-1012), the Probation Violator Diversion Program which was sponsored by Representative Dan McGee. This statute allows the bureau to authorize jail sanctions on probationers who have technically violated their probation. Through administrative intervention hearings, the bureau is able to consequent offenders for violating their probation without writing a report of violation and going through the formal process of revocation involving the court.

The jail sanction consequence is immediate and effective. It works to get the offender's attention and get the offender to comply with the court's order. Jail Sanctions is used mostly for technical violations and alcohol/drug use violations. Jail sanctions, in conjunction with treatment, is the common response for those addicted offenders who are using alcohol or drugs against the court's order. The other major goal of jail sanctions is to ultimately divert these probation violators from entering the prison system.

This bill increases the length of time an offender may be held in jail before an intervention hearing is required, from 36 hours to 72 hours. 36 hours is problematic for the Hearing Officers and the Probation officers as they often must hold these hearing on weekends and evenings: Due to this short 36 hour time period, the P&P officer does not have adequate time to

- ♦ staff the alleged violations with supervisor;
- ♦ complete a thorough investigation of the facts; and
- ♦ get witnesses and law enforcement to be present;

The end result is the Probation & Parole Officer releases the offender back into the community and without any type of hearing or consequence due to lack of information and time. This jeopardizes community safety and is not good public policy.

The 72 hours would allow the necessary time to investigate the alleged violation, staff it with the supervisor and locate witnesses. For example, if an offender is arrested at 5:00 p.m. on Friday, the 72 hours gives officers until Monday at 5:00 p.m. to hold a hearing. Officers, I'm told, who can not meet the 36-hour deadline simply do not use the jail sanction procedure.

The bill also gives the probation violator diversion program or jail sanction program it's own section which better clarifies the process of using jail sanctions for both the bureau and the court.

5. This bill also specifies that a report of violation must be filed in 10 days of the probationer's arrest. Presently the statute is vague and says "reasonable" and/or "immediately". No one knows what that means exactly. Attorneys and P&P Officers believe a "15 day rule" exists, however, this is not in current statute.
6. 46-23-1012, is so confusing several Judges prohibited officers from using it in their districts and another judge ruled that Probation & Parole officers have to conduct an intervention hearing in every case where a probationer has allegedly committed technical violations.

In one case, the Probation & Parole Officer determined the alleged probation violation was so serious that she did not use the intermediate intervention hearing process and instead wrote a formal report of violation and requested a petition for the court to revoke this offenders probation.

The Judge ruled in that case that the Probation & Parole officer must first have an intervention hearing prior to writing the report of violation. This resulted in the Judge dismissing the petition to revoke and released the offender from jail. This bill would make clear the original intent of the statute.

In conclusion, I urge you to give HB 151 your due consideration.

Thank you for the opportunity to testify on behalf of this bill. I'd be glad to answer any questions you may have.

MEMORANDUM OF LAW

FROM: Diana Leibinger-Koch, Legal Counsel for Mt. Dept. of Corrections	March 13, 2001
RE: Ex Post Facto Constitutional concerns with HB 151	

DOES HB 151 VIOLATE THE CONSTITUTIONAL BAN ON EX POST FACTO LAWS?

The United States Supreme Court said the Ex Post Facto Clause is aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *California Dept. of Corrections v. Morales*, 514 U.S. 499, 504 (1995). The Ex Post Facto Clause "bars application of a law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Johnson v. United States*, 529 U.S. 694, 146 L.Ed 2d 727, 735 (2000)(internal quotations omitted). Courts apply a two-part test to determine whether a statute violates the ban on ex post facto laws: (1) the law must operate retroactively, and (2) it must also raise the penalty beyond the penalty the law allowed when the defendant committed the criminal act. *Id.*; *State v. Leistiko*, 256 Mont. 32, 36-37, 844 P.2d 97, 100 (1992).

If the Legislature passes this bill, the courts may apply its provisions to any defendant who commits a crime after the effective date of this legislation without violating the ban on ex post facto laws. The only defendants to whom ex post facto concerns may apply is defendants who committed a crime before the effective date of this legislation, and on whom a judge imposed a probationary sentence. This bill would apply retroactively to these offenders if a judge changed or added conditions to the defendant's probation without first finding the defendant violated probation. Since this bill would act retroactively, we must determine, therefore, if a judge adds conditions to probation if that would increase the penalty beyond that which the court could have imposed before this legislation became effective.¹ If it increases the punishment over what the judge could have imposed before the Legislature passed this bill, it is an unconstitutional application of the statute.

The Montana case that is the most clearly on-point with the ex post facto concerns in this legislation is *State v. Leistiko*, 256 Mont. 32, 844 P.2d 97 (1992). Mr. Leistiko shot his girlfriend in the back on January 1, 1985. He permanently paralyzed her. The judge sentenced him to 17 years in prison, but suspended 9 years. After Leistiko finished his prison term and went on probation the judge determined Leistiko had violated probation. Under the version of 46-18-203 that was in effect when Leistiko committed his crime, the judge only had two options on a probation violation. He could continue the probation or he could revoke it and send him to

¹It is important to note that if a defendant wins an ex post facto challenge in the Supreme Court it would not nullify this statutory change. It would only prohibit a judge from applying it in that one particular case to that one particular defendant. That is called an "as applied" challenge in contrast to a "facial" challenge to the validity of the statute as it would apply to every defendant.

prison. He could not, under the 1985 version of 46-18-203 change the conditions of probation he had originally imposed. The 1991 version of 46-18-203, however, allowed the judge to change the conditions of probation. On the revocation, the judge applied the 1991 statute retroactively and allowed Leistikio to remain on probation on the condition he pay an additional \$10,000 of restitution to his victim. Leistikio appealed on the grounds that when the court applied the 1991 law to him it violated the ban on ex post facto laws. The Supreme Court said the district court applied the 1991 law to Leistikio retroactively, and the Court also said it disadvantaged him because it put "a substantial additional burden" on Leistikio, so it violated the ban on ex post facto laws.

In another Montana case, though, the Supreme Court said the Department of Corrections could impose supervision fees on offenders who had committed crimes before the Legislature enacted the supervision fee provision. *Frazier v. Montana DOC*, 277 Mont. 82, 920 P.2d 93 (1996). The Court reasoned that the purpose of the supervision fee was not to punish the offender or add to the measure of punishment, but to "make the offender more responsible for his rehabilitation in the form of paying for supervision services rendered." *Id.* at 86, 920 P.2d at 96 (quoting the district court).

The United States Supreme Court has given us some guidance, but no formula about what falls between the two obvious examples in Montana case law. In *California Dept. of Corrections v. Morales*, 514 U.S. 499, (1995) the Court dealt with a California statute that changed and lengthened the amount of time between parole board appearances for inmates. Morales argued that California could not apply the new parole guidelines to him without violating ex post facto principles. The Court said, "we must determine whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 509. The Court said the California law "creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the Ex Post Facto Clause." *Id.*

And so it is with the instant statutory change before this Legislature. There is always a chance that if a judge adds a condition to an offender's probation, the offender will violate the condition and then be subject to incarceration for the violation. Under the Supreme Court's analysis, though, that possibility is too speculative and attenuated a possibility to produce the unconstitutional effect. It is clear from Montana case law that a judge cannot add a condition to an offender's probation that would impose an increased financial obligation, like increased restitution or fine or impose more incarceration in prison or jail. That would unequivocally increase the offender's measure of punishment. It seems equally as clear, though, that a judge can add conditions that the offender procure treatment,² stay away from minor children, not drink, or not engage in other conduct without unconstitutionally increasing the offender's

²There is also a risk the offender will have to pay for treatment, but it is not definite the offender will have to pay with no help from state money, and the state cannot revoke an offender for failure to pay for treatment. See *State v. Lundquist*, 251 Mont. 329, 825 P.2d 204 (1992).

measure of punishment. If the judge must add conditions to an offender's probation when the original sentencing judge failed to include conditions, the judge would have to stay within these parameters and not impose jail time, a fine or restitution.

SENATE JUDICIARY

EXHIBIT NO. 10DATE 03/14/01BILL NO. 18151

MEMORANDUM

To: House Judiciary Committee
From: Diana Leibinger-Koch
Subject: House Bill 151; Double Jeopardy; Federal Statutes and Cases
Date: March 14, 2001

Representative Harris requested information about how the federal courts treated the issue of changing conditions of probation and asked whether there were any federal cases that dealt with double jeopardy within the context of changing the conditions of probation. This is the summary of my research.

There is a federal statute that the United States Congress enacted that allows federal judges to do exactly what House Bill 151 proposes Montana judges be allowed to do: modify or add conditions to an offender's probation even if the judge does not first find the probationer violated probation. The federal statute is 18 USCS § 3583 (e) (2). The federal statute refers to probation and "supervised release" which is almost the same as Montana's version of probation. The federal statute says,

(e) Modification of conditions or revocation. The court may...
(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post_release supervision;

Subsection (2) refers to "the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation...." The applicable Federal Rule of Criminal Procedure is Rule 32.1(b). It imposes only the following procedural requirements:

(b) Modification of Probation or Supervised Release. A hearing and assistance of counsel are required before the terms or conditions of probation or supervised release can be modified, unless the relief to be granted to the person on probation or supervised release upon the person's request or the court's own motion is favorable to the person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation or supervised release is not favorable to the person for the purposes of this rule.

One federal appeals court, the sixth circuit court, has agreed this statute allows the court to modify or add conditions to an offender's supervised release without first finding the offender violated supervised release. *U.S. v. Lowenstein*, 108 F.3d 80, 84-85 (6th Cir.

Exh. #10 HB151

1997). This case is much like the *State v. Glen Nelson* case to which this writer referred in the memo of January 18. In *State v. Glen Nelson*, the judge did not find that Nelson had violated probation but added the condition to Nelson's probation that he was prohibited from contact with minor children. The district court later revoked Nelson's probation because he had contact with minor children. The Supreme Court said the judge could not impose another condition to Nelson's probation unless he first found Nelson had violated probation *because the statute did not allow it*.

In *U.S. v. Lowenstein* the federal district court found that Lowenstein had violated supervised release and the judge added the condition that Lowenstein was prohibited from making harassing or inappropriate phone calls. When Lowenstein made harassing phone calls the district court violated his supervised release and sent him to prison. The appeals court said it did not matter that the government had not proven that Lowenstein violated any condition of his supervised release. The appeals court said the statute, 18 USCS § 3583 (e) (2) (quoted above) allows the court to modify or add conditions of supervised release without first finding a violation. The appeals court saw no constitutional problems with that.

The United States Congress, therefore, saw no double jeopardy problems with a statute that does the same thing House Bill 151 proposes to do. To date, no federal court has found a double jeopardy problem with this statute. Tom Corbett, the Deputy Chief of U.S. Probation and Pretrial Services in Helena said the district court routinely grants probation officers' requests to modify or add conditions to release on supervision. If there was going to be a double jeopardy challenge to a change of conditions under the federal statute, it would have been made by now. There is no case that indicates anyone has even raised a double jeopardy challenge to this federal statute.

The federal cases are very clear that *anything* the court does within the context of release on probation, parole, or supervised release is part of the *one* initial punishment for the criminal offense for which the court convicted the offender. Federal courts have consistently held that it does not violate double jeopardy when a court revokes a term of probation or supervised release and sends the defendant to prison. The Ninth Circuit Court has said that **revocation of supervised release is not new punishment for a new crime. It is "part of the whole matrix of punishment which arises out of a defendant's original crime", of which the defendant has already been convicted after a trial subject to the full panoply of constitutional guarantees.** The United States Supreme Court said there would be "serious constitutional questions" raised if revocation of probation or supervised release was not merely part of the initial punishment for the initial criminal offense the defendant committed. *Johnson v. United States*, 529 U.S. 694, 120 S. Ct. 1795, 1800-1801 (2000).

Montana courts also routinely revoke an offender's probation and send the offender to prison. A lot of times, the court revokes an offender's probation because the offender commits a new



crime. The State seemingly is able to give the offender two punishments; one for the probation violation, and one for the new offense. Both punishments arise out of the same conduct: the new offense. However, that does not violate double jeopardy. Why? Because the sanction for violating probation is part and parcel of the original punishment the court imposed for the original criminal offense the offender committed. The Montana Supreme Court invoked the reasoning of the U.S. Supreme Court and the Ninth Circuit in another *Nelson* case, *State v. David Nelson*, 275 Mont. 86, 910 P.2d 247 (1996). The Court cited *United States v. Soto-Olivas*, 44 F.3d 788, 790 (9th Cir. 1995) with approval and said, "**since the revocation of parole or probation is part of the original sentence**, and since the continuation of parole or probation is conditioned on compliance with stated conditions, revocation of parole or probation is regarded as reinstatement of the sentence for the underlying crime and **not punishment for the conduct leading to the revocation**....Accordingly, we hold that under § 53-30-105(2), MCA (1993), the multiple punishments prohibition of the Double Jeopardy Clause does not bar criminal prosecution for escape when an inmate defendant already has been subjected to forfeiture of all good time credits in prison disciplinary proceedings arising from the same incident." (emphasis added).

Since it does not violate double jeopardy to sanction a defendant with a new criminal sentence and revoke the defendant's probation, the same principle applies to changing the conditions of probation. The mere fact the defendant has violated probation **does not change the double jeopardy analysis**. The act of revocation of probation and the act of sending the defendant to prison is **not another punishment**; therefore, the act of changing the terms or conditions of probation cannot possibly be considered another punishment, and the act of changing the terms or conditions of probation does not violate double jeopardy. No court, state or federal has ruled that changing or adding terms or conditions to probation violates double jeopardy.

The conclusion is inescapable. House Bill 151 does not violate double jeopardy. The United States Congress enacted a similar provision without violating double jeopardy, and the Montana Supreme Court agrees with the double jeopardy analysis of the U.S. Supreme Court and the Ninth Circuit. If a judge changes the conditions under which it originally set a criminal defendant at liberty or adds additional conditions to the conditional liberty it gave a criminal defendant it does not violate double jeopardy because the court does not impose *another* punishment. No court has ever ruled it does.



SENATE JUDICIARY

EXHIBIT NO.

DATE 03/14/01
HB 151

MONTANA COUNTY ATTORNEYS ASSOCIATION

PO Box 201439

Helena, Montana 59620-1439

March 13, 2001

Lorents Grosfield, Chair
Senate Judiciary Committee, Montana Legislature

RE: HB151

Dear Senator Grosfield and Members of the Committee:

The Montana County Attorneys Association supports the passage of HB151. The provisions of the bill would allow the Courts to make necessary and reasonable additions and modifications to the terms of probation imposed under a criminal sentence. Under present law, it is virtually impossible to modify conditions of probation after sentence has been pronounced. We frequently find that it would be desirable to add or modify probation conditions after sentencing due to changes in circumstances. I urge you to vote yes on the bill.

The need for this legislation is best exemplified by the case of Clifford Becker. Becker was convicted of Kidnaping and Attempted Rape in Powell County in 1985. He was sentenced to a lengthy term in prison, with a portion of his sentence suspended. The Court's order provided that during the term of the suspended sentence, he would be subject to the supervision of the Office of Adult Parole and Probation. The order did not provide for specific conditions of probation. On March 6, 2001 Becker discharged his prison sentence and began serving the suspended portion of the Judgment. While at Montana State Prison Becker accrued more than 120 conduct violations. In 1990, Becker was convicted of Felony Assault on a staff member. Becker has not been rehabilitated.

Under the 1985 Judgment, Becker is subject to the standard conditions of probation which include requirements that he check in with his probation officer, advise the probation office of any change in address, and remain law abiding. The standard conditions do not include restrictions on the defendant entering bars, using alcohol, associating with minors, possessing pornography, or similar restrictions. It is my opinion that such restrictions would be very helpful to the state in monitoring Becker's activities. These special conditions would also improve public safety, by greatly restricting the circumstances that may result in the defendant committing additional offenses.

As noted above, present law does not allow the state to impose reasonable additional restrictions on Mr. Becker. The changes proposed in HB151 would allow the Court to conduct a hearing, with the participation of the defendant, to determine whether the requested additional conditions of probation are proper and necessary and to order that they be imposed. This bill would give the probation and parole officers a potent weapon with which to manage the probationers under their supervision. The legislation would afford prosecutors and the Court the much needed opportunity to adjust probationary sentences in ways that will most benefit the interests of society.

Again, I urge you to vote favorably on HB151. If you have any questions, please call me at (406) 846-3680. Thank you for your consideration.

Sincerely,

Christopher G. Miller
Powell County Attorney

Post-It® Fax Note	7671	Date	3-13-01	# of Pages	1
To	Diana Leibnarr-Koch		From	Chris Miller	
Co./Dept.			Co.		
Phone #			Phone #	846-3680	
Fax #	444-1494		Fax #		

Exh. #11 HB 151

MINUTES

MONTANA SENATE 57th LEGISLATURE - REGULAR SESSION COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on March 26, 2001
at 9:00 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. Duane Grimes, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Walter McNutt (R)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Branch
Cecile Tropila, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Executive Action: HB 256, HB 419, HB 151, HB
213, HB 360, HB 434, HB 290,
HB 165

EXECUTIVE ACTION ON HB 256

Discussion:

SEN. DUANE GRIMES explained the bill pertaining to penalty
increases for careless and reckless driving.

Pam Bucy understood the amendments for Fish, Wildlife and Parks dealt with the residency cases to be addressed.

SEN. O'NEIL believed the reason for Fish, Wildlife and Parks involvement dealt with the funding. He thought they would lose their funding if no money went into the budget.

Vote: Motion carried 6-1 with **SEN. BISHOP** voting no.

EXECUTIVE ACTION ON HB 151

Motion: **SEN. DOHERTY** moved HB 151 BE CONCURRED IN.

Discussion:

SEN. GRIMES explained the punishments and how they would not be dealing with the same activity.

SEN. DOHERTY said the issues dealt with double jeopardy and the proponents responded accurately. **SEN. O'NEIL** viewed this bill to punish felons by giving additional sentencing.

SEN. DOHERTY mentioned the pre-sentencing investigation for misdemeanors. **SEN. GRIMES** asked how this coordinates with another bill dealing with pre-sentencing investigations. **Valencia Lane** mentioned the other bill and how it was amended.

Vote: Motion carried unanimously 7-0.

EXECUTIVE ACTION ON HB 213

Discussion:

SEN. GRIMES thought this to be a good bill. He was concerned about changing the language of tribunal to court.

Motion: **SEN. O'NEIL** moved HB 213 BE AMENDED. Adding language on page three, line 18; "if a foreign protection order is not presented a law enforcement officer of this state may, after verifying facts present on the National Crime Information Center to support his/her conclusion, and determine probable cause".

Discussion:



AN ACT CLARIFYING THAT THE DEPARTMENT OF CORRECTIONS ONLY SUPERVISES PROBATIONERS WHO ARE FELONY OFFENDERS; CLARIFYING THAT THE DISTRICT COURT MAY ADD CONDITIONS TO OR MODIFY CONDITIONS OF PROBATION; PROVIDING A PROCEDURE FOR ADDING OR MODIFYING CONDITIONS OF PROBATION; CLARIFYING PROVISIONS RELATING TO PROBATION REVOCATION HEARINGS; PROVIDING FOR AN INFORMAL PROBATION VIOLATION INTERVENTION HEARING; AMENDING SECTIONS 46-18-111, 46-18-203, 46-23-1004, 46-23-1011, AND 46-23-1012, MCA; REPEALING SECTION 46-23-1013, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 46-18-111, MCA, is amended to read:

"46-18-111. **Presentence investigation -- when required.** (1) Upon the acceptance of a plea or upon a verdict or finding of guilty to one or more felony offenses, the district court shall direct the probation officer to make a presentence investigation and report. The district court shall consider the presentence investigation report prior to sentencing. If the defendant was convicted of an offense under 45-5-502, 45-5-503, 45-5-504, 45-5-505, 45-5-507, 45-5-625, or 45-5-627, the investigation must include a psychosexual evaluation of the defendant and a recommendation as to treatment of the ~~offender~~ defendant in the least restrictive environment, considering the risk the ~~offender~~ defendant presents to the community and ~~offender~~ the defendant's needs, unless the defendant was sentenced under 46-18-219. The evaluation must be completed by a sex offender therapist who is a member of the Montana sex offender treatment association or has comparable credentials acceptable to the professional and occupational licensing bureau of the department of commerce. The psychosexual evaluation must be made available to the county attorney's office, the defense attorney, the probation and parole officer, and the sentencing judge. All costs related to the evaluation must be paid by the defendant. If the defendant is determined by the district court to be indigent, all costs related to the evaluation are the responsibility

district court and must be paid by the county or the state, or both, under Title 3, chapter 5, part

(2) The court shall order a presentence report unless the court makes a finding that a report is unnecessary. Unless the court makes ~~such a~~ that finding, a defendant convicted of any offense not enumerated in subsection (1) that may result in incarceration for 1 year or more may not be sentenced unless a written presentence investigation report by a probation and parole officer is presented to and considered by the district court. The district court may order a presentence investigation for a defendant convicted of a misdemeanor only if the defendant was convicted of a misdemeanor that the state initially charged as a sexual or violent offense as defined in 46-23-502. ~~The district court may, in its discretion, order a presentence investigation for a defendant convicted of a misdemeanor."~~

Section 2. Section 46-18-203, MCA, is amended to read:

"46-18-203. Revocation of suspended or deferred sentence. (1) Upon the filing of a petition for revocation showing probable cause that the offender has violated any condition of a sentence or any condition of a deferred imposition of sentence, the judge may issue an order for a hearing on revocation. The order must require the offender to appear at a specified time and place for the hearing and be served by delivering a copy of the petition and order to the offender personally. The judge may also issue an arrest warrant directing any peace officer or a probation and parole officer to arrest the offender and bring the offender before the court.

(2) The petition for a revocation must be filed with the sentencing court during the period of suspension or deferral. Expiration of the period of suspension or deferral after the petition is filed does not deprive the court of its jurisdiction to rule on the petition.

(3) The provisions pertaining to bail, as set forth in Title 46, chapter 9, are applicable to persons arrested pursuant to this section.

(4) Without unnecessary delay, the offender must be brought before the judge, and the offender must be advised of:

- (a) the allegations of the petition;
- (b) the opportunity to appear and to present evidence in the offender's own behalf;
- (c) the opportunity to question adverse witnesses; and

(d) the right to be represented by counsel at the revocation hearing pursuant to Title 46, chapter 8, part 1.

(5) A hearing is required before a suspended or deferred sentence can be revoked or the terms or conditions of the sentence can be modified, unless:

(a) the offender admits the allegations and waives the right to a hearing; or

(b) the relief to be granted is favorable to the offender and the prosecutor, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation is not favorable to the offender for the purposes of this subsection (5)(b).

(6) At the hearing, the prosecution shall prove, by a preponderance of the evidence, that there has been a violation of the terms and conditions of the suspended or deferred sentence. However, when a failure to pay restitution is the basis for the petition, the offender may excuse the violation by showing sufficient evidence that the failure to pay restitution was not attributable to a failure on the offender's part to make a good faith effort to obtain sufficient means to make the restitution payments as ordered.

(7) (a) If the judge finds that the offender has violated the terms and conditions of the suspended or deferred sentence, the judge may:

(i) continue the suspended or deferred sentence without a change in conditions;

(ii) continue the suspended sentence with modified or additional terms and conditions;

(iii) revoke the suspension of sentence and require the offender to serve either the sentence imposed or any lesser sentence; or

(iv) if the sentence was deferred, impose any sentence that might have been originally imposed.

(b) If a suspended or deferred sentence is revoked, the judge shall consider any elapsed time and either expressly allow all or part of the time as a credit against the sentence or reject all or part of the time as a credit. The judge shall state the reasons for the judge's determination in the order. Credit, however, must be allowed for time served in a detention center or home arrest time already served.

(c) If a judge finds that an offender has not violated a term or condition of a suspended or deferred sentence, that judge is not prevented from setting, modifying, or adding conditions of probation as provided in 46-23-1011.

(8) If the judge finds that the prosecution has not proved, by a preponderance of the evidence, that there has been a violation of the terms and conditions of the suspended or deferred sentence, the

petition must be dismissed and the offender, if in custody, must be immediately released."

Section 3. Section 46-23-1004, MCA, is amended to read:

"**46-23-1004. Duties of department.** The department is responsible for any investigation and supervision requested by the board or the courts for felony offenders. The department shall:

- (1) divide the state into districts and assign probation and parole officers to serve in these districts and courts;
- (2) obtain any necessary office quarters for the staff in each district;
- (3) assign the secretarial, bookkeeping, and accounting work to the clerical employees, including receipt and disbursement of money;
- (4) direct the work of the probation and parole officers and other employees;
- (5) formulate methods of investigation, supervision, recordkeeping, and reports;
- (6) conduct training courses for the staff;
- (7) cooperate with all agencies, public and private, that are concerned with the treatment or welfare of persons on probation or parole;
- (8) administer the interstate compact for the supervision of parolees and probationers; and
- (9) notify the employer of a probationer or parolee if the probationer or parolee has been convicted of an offense involving theft from an employer."

Section 4. Section 46-23-1011, MCA, is amended to read:

"**46-23-1011. Supervision on probation.** (1) The department shall supervise ~~offenders~~ probationers during their probation period in accord with the conditions set by a sentencing judge. If the sentencing judge did not set conditions of probation at the time of sentencing, the court shall, at the request of the department, hold a hearing and set conditions of probation. The probationer must be present at the hearing. The probationer has the right to counsel as provided in chapter 8 of this title.

(2) A copy of the conditions of probation must be signed by the probationer ~~and given to the probationer and the probationer's probation and parole officer, who shall report on the probationer's progress under rules of the sentencing judge. Any probation agreement signed by the probationer may contain a clause waiving extradition.~~ The department may require a probationer to waive extradition for

the probationer's return to Montana.

(3) The probation and parole officer shall regularly advise and consult with the probationer to encourage the probationer to improve the probationer's condition and conduct and shall inform the probationer of the restoration of rights on successful completion of the sentence.

(4) (a) The probation and parole officer may recommend and a judge may modify or add any condition of probation or suspension of sentence at any time. ~~Notice must be given to the probation and parole officer before any condition is modified, and the officer must be given an opportunity to present the officer's ideas or recommendations on any modification.~~

(b) The probation and parole officer shall provide the county attorney in the sentencing jurisdiction with a report that identifies the conditions of probation and the reason why the officer believes that the judge should modify or add the conditions.

(c) The county attorney may file a petition requesting that the court modify or add conditions as requested by the probation and parole officer.

(d) The court may grant the petition if the probationer does not object. If the probationer objects to the petition, the court must hold a hearing pursuant to the provisions of 46-18-203.

(e) The provisions of 46-18-203(7)(a)(ii) do not apply to this section.

(f) A The probationer shall sign a copy of a modification of new or modified conditions must be delivered to the probation and parole officer and the probationer. Waiver or modification of probation. The court may waive or modify a condition of restitution may be ordered only as provided under the provisions of in 46-18-246.

~~(5) The probation and parole officer shall keep records as the department or the sentencing judge may require.~~

~~(6)~~(5) (a) Upon recommendation of the probation and parole officer, a judge may conditionally discharge a probationer from supervision before expiration of the probationer's sentence if:

(i) the judge determines that a conditional discharge from supervision:

(A) is in the best interests of the probationer and society; and

(B) will not present unreasonable risk of danger to the victim of the offense; and

(ii) the offender has paid all restitution and court-ordered financial obligations in full.

(b) Subsection ~~(6)(a)~~ (5)(a) does not prohibit a judge from revoking the order suspending execution

or deferring imposition of sentence, as provided in 46-8-203, for a probationer who has been conditionally discharged from supervision.

(c) If the department certifies to the sentencing judge that the workload of a district probation and parole office has exceeded the optimum workload for the district over the preceding 60 days, the judge may not place an offender on probation under supervision by that district office unless the judge grants a conditional discharge to a probationer being supervised by that district office. The department may recommend probationers to the judge for conditional discharge. The judge may accept or reject the recommendations of the department. The department shall determine the optimum workload for each district probation and parole office."

Section 5. Section 46-23-1012, MCA, is amended to read:

"46-23-1012. Arrest when violations of probation alleged -- probation compliance plan -- probation violator ~~prison diversion program intervention~~. (1) At any time during probation ~~or suspension of sentence~~, if a probation and parole officer reasonably believes that the probationer has violated a condition of probation, a court may issue a warrant for the arrest of the ~~defendant for violation of any of the conditions of release~~ probationer or a county attorney may issue a notice to appear to answer to a charge of probation violation. The notice must be personally served upon the ~~defendant~~ probationer. The warrant must authorize ~~all law enforcement officers named in the warrant~~ to return the ~~defendant~~ probationer to the custody of the court or to any suitable detention facility designated by the court center.

(2) Any probation and parole officer may arrest the ~~defendant~~ probationer without a warrant or may orally deputize any other officer with power of arrest to do so by giving the officer oral authorization and within 12 hours delivering to the ~~place of detention~~ center a written statement setting forth that the ~~defendant~~ probationer has, in the judgment of the probation and parole officer, violated the conditions of the ~~defendant's release~~ probation. A written statement or oral authorization delivered with the ~~defendant~~ probationer by the arresting officer to the official in charge of a ~~county~~ detention center ~~or other place of detention~~ is sufficient warrant for the detention of the ~~defendant~~ probationer if the probation and parole officer delivers the written statement within 12 hours of the ~~defendant's~~ probationer's arrest. The probation and parole officer, after making an arrest, shall present to the detaining authorities a similar statement of the circumstances of violation.

~~(3) Provisions regarding release on bail of a person charged with a crime are applicable to the defendants arrested under these provisions.~~

~~———— (4) Any probation and parole officer may hold a defendant arrested under subsection (1) without bail for 72 hours. After the arrest of the defendant pursuant to this subsection, a hearings officer for the probation and parole bureau shall hold a hearing within 36 hours of the defendant's arrest. The hearings officer shall determine whether there is probable cause to believe that the defendant has violated a condition of probation and, if probable cause exists, notify the sentencing court and determine an appropriate plan to ensure the defendant's compliance with the conditions of probation. An appropriate plan may include:~~

~~———— (a) holding the defendant for a period of time up to 30 days, with credit for any time served from the time of the arrest to the time of the hearing to determine probable cause;~~

~~———— (b) a request to the court pursuant to 46-23-1011 to modify the defendant's terms or conditions of probation; or~~

~~———— (c) a notification to the court with jurisdiction over the defendant pursuant to 46-23-1013.~~

~~———— (5) The department shall adopt policies and procedures to implement a probation violator prison diversion program. If the department is able to sufficiently sanction a defendant with a term in a detention center as provided in subsection (4)(a) for a proven technical violation that could result in the revocation of a suspended or deferred sentence, the department may pay the expense of the detention center costs and pursue payment of costs by the defendant as provided in 7-32-2245. If the action plan developed for the defendant proceeds as provided in subsection (4)(b) or (4)(c), the expenses of the detention must be paid as provided in 7-32-2242.~~

(3) A probation and parole officer may authorize a detention center to hold a probationer arrested under this section without bail for 72 hours. Within 72 hours following the probationer's detention, the probation and parole officer shall:

(a) authorize the detention center to release the probationer;

(b) hold an intervention hearing pursuant to [section 6]; or

(c) arrange for the probationer to appear before a magistrate to set bail. In setting bail, the provisions of chapter 9 of this title regarding release on bail of persons charged with a crime apply.

(4) If the probationer is detained and bond is set, the probation and parole officer shall file a report

of violation within 10 days of the arrest of the probationer.

(5) After the probation and parole officer files a report of violation, the court may proceed with revocation of probation in the manner provided in 46-18-203."

Section 6. Informal probation violation intervention hearing. (1) A probation and parole officer who reasonably believes that a probationer has violated a condition of probation may initiate an informal probation violation intervention hearing to gain the probationer's compliance with the conditions of probation without a formal revocation hearing under 46-18-203.

(2) A hearings officer designated by the department shall conduct the intervention hearing.

(3) If the hearings officer determines by a preponderance of the evidence that the probationer has violated a condition of probation, the hearings officer may order the probationer to serve up to 30 days in a county detention center, with credit for time served since the time of arrest, and order the probationer to pay the costs of incarceration. The department shall pay the incarceration costs not paid by the probationer.

(4) The provisions of chapter 9 of this title regarding release on bail of a person charged with a crime are not applicable to a probationer ordered to be held in a county detention center under this section.

Section 7. Repealer. Section 46-23-1013, MCA, is repealed.

Section 8. Codification instruction. [Section 6] is intended to be codified as an integral part of Title 46, chapter 23, part 10, and the provisions of Title 46 apply to [section 6].

Section 9. Effective date. [This act] is effective on passage and approval.

Section 10. Retroactive applicability. [This act] applies retroactively, within the meaning of 1-2-109, to offenders who are under the custody or supervision of the department of corrections on [the effective date of this act].

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